NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **VICTORIA PORFILIO,** Complainant, v. **MT. ST. MARY'S HOSPITAL AND DR. JOHN CHRISTOUDOULIDES, INDIVIDUALLY, AS AIDER AND ABETTOR,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10107052

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on March 6, 2008, by David Wm. Bowden, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"), WITH THE FOLLOWING AMENDMENTS:

- New York State's standards relating to the elements of a hostile work environment are set out in *Father Belle Community Ctr., Inc. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept 1996), *leave to appeal denied,* 89 N.Y.2d 809 (1997) ("A hostile work environment exists '[w]hen the workplace is permeated with

'discriminatory intimidation, ridicule, and insult,' ... that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment'"). In the instant case, Complainant has failed to demonstrate that she was subjected to behavior that was severe enough or pervasive enough to constitute a hostile work environment.

- Furthermore, as noted, Respondent took prompt and effective remedial action. *See Vitale v. Rosina Food Prods.*, 283 A.D.2d 141, 143, 725 N.Y.S.2d 215, 218 (4th Dept. 2001) ("defendant may disprove condonation by a showing that it reasonably investigated complaints of discriminatory conduct and took corrective action.").
- The Recommended Order is adopted insofar as the credible facts in the record do not rise to the level of discriminatory behavior under New York State law, as set forth above.

In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist

from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED, this 28th day of March, 2008.

KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

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on the Complaint of

VICTORIA PORFILIO,

Complainant,

v.

MT. ST. MARY'S HOSPITAL AND DR. JOHN CHRISTOUDOULIDES, INDIVIDUALLY, AS AIDER AND ABETTOR,

Respondents

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10107052**

SUMMARY

On August 13, 2004, after performing scrotal surgery, the Complainant and Respondent Dr. Christoudoulides remained in a surgical operating room. Respondent Dr. Christoudoulides was directing air upon his patient's wound, by fanning it, to dry the glue that he had applied to the incision to seal it. Complainant was his nurse. Respondent Christoudoulides told her that: "its time to blow on it" referring to the sealant glue, and a moment later, he told Complainant to render a "blow job". Complainant objected and Respondent Christoudoulides explained that he meant to fan dry it, as he continued fanning the drying glue. Complainant reported this rude humor to her employer, Respondent Mount St. Mary's Hospital, which took action that same day, informing Respondent Christoudoulides that such language is intolerable and that sanctions will follow if he ever repeated it. All parties agree that Dr. Christoudoulides never did it again. The remedy applied by Complainant's employer was very swift and absolutely effective. Hence, there is no liablilty on the part of Respondent Mount St. Mary's Hospital. The facts of this case did not rise to the level of a cognizable cause of action. The complaint is dismissed.

PROCEEDINGS IN THE CASE

On August 2, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before David Wm. Bowden, an Administrative Law Judge of the Division. Public hearing sessions were held on September 4, 5 and 6. 2007. During trial, the complaint was amended without objection to conform to the proof. Accordingly, the complaint is amended to assert that the act of sexual harassment therein alleged occurred on August 13, 2004, not on August 12, 2004.

Complainant and Respondents appeared at the hearing. Complainant was represented by Lindy Korn, Esq. Respondent Mt St. Mary's Hospital was represented by Michael R. Moravec, Esq. Respondent Dr. John Christoudoulides was represented by Robert A. Doren, Esq.

Permission to file post-hearing briefs was granted. Those briefs were timely submitted by counsel for all parties.

FINDINGS OF FACT

1. Complainant was hired by the Respondent Hospital in March of 1986. Respondent Hospital has employed her since then as a staff nurse for the operating room. (T. 131; 134)

2. Respondent Dr. John Christoudoulides is a specialist in urology. (T. 335) He is from Cyprus, and got his medical degree from the University of Athens, Greece. (T. 335) His verbal syntax (including his language quoted hereinbelow) seems very slightly affected by his origin.

3. Respondent Dr. Christoudoulides has not been an employee of the hospital. He has privileges to treat his patients in the Respondent Hospital. (T. 103; 338)

4. Complainant and Respondent Christoudoulides worked together during surgery on August 13, 2004; that was the second time that they had ever worked together. (T. 350)

5. Paul Livingston is an Operating Room Technician at Respondent Mount St. Mary's Hospital. He was present during and after surgery performed by Respondent Christoudoulides, with Complainant serving as his nurse, on August 13, 2004.

6. Dr. Jacob Rempel was present then and there as the anesthesiologist. (T. 75)

7. On the morning of August 13, 2004, Complainant and Respondent Christoudoulides had surgical operations on the scrota of two patients, sequentially. The first operation was swift. It took only twenty minutes (T. 351; 357)

8. After the first surgical operation, the anesthesiologist commended the surgeon, Respondent Christoudoulides, for how quickly the case had been completed. Respondent Christoudoulides replied to him that he did not like to linger in surgery, then joked that the only time that he might linger in surgery is when a pretty student nurse in the room. (T. 289; 357)

9. To this remark, Complainant asked:"You have Paul. Don't you like Paul?" (T. 357) or "Isn't Paul pretty enough for you?" (T. 163 ; 289) This humorous banter led to an escalation of ribaldry to a rude, coarse and offensive degree. (T. 360)

10. Respondent Christoudoulides felt that this utterance from the Complainant was, in effect, an invitation to a responsive similar joke, and that Complainant would not mind. (T. 360) That did not prove to be the case.

11. After Respondent Christoudoulides closed the scrotal incision of his second patient, again he applied glue to seal the wound and fanned it to accelerate drying of that glue. (T. 359)

12. Respondent Christoudoulides then told Complainant that: "Its time to blow on it" referring to the glue, as he fanned the glue to dry it. The Complainant then asked: "What?" and Respondent Christoudoulides thought that Complainant had not heard him and she was asking him to repeat what he had said. Accordingly, he answered: "It needs a blow job." (T. 359) Respondent Christoudoulides told Complainant to blow on it. (T. 271)

13. Complainant, the witness Paul Livingston, and Respondent Christoudoulides all understood this to be a joke, however ill-considered and vulgar. (T. 73; 273; 360)

14. Complainant objected, saying: "I don 't do that sort of thing" whereupon Respondent Christoudoulides explained that: "I meant fan dry it" as he continued to fan dry the glue. (T. 360)

15. Respondent Christoudoulides has admitted that he recognizes that his remark was inappropriate. (T. 360) It appears to have been a thoughtless play on words. (T. 360)

16. The words in question were fleeting; they took about 15 or 20 seconds of time. (T. 360)

17. Complainant admits that the offensive words took less than a minute. (T. 273)

18. Respondent Christoudoulides did not say "give the patient a blow job." (T. 82; 359)

19. When Respondent Christoudoulides, told Complainant to blow on it, she knew that he did not wish her to actually do anything to the patient, because it was a joke. (T. 273; 275)

20. At the time of this utterance by Respondent Christoudoulides, Complainant and Respondent Christoudoulides were wearing surgical masks. (T. 270)

21. At the time of this utterance by Respondent Christoudoulides, all parts of the patient's anatomy, including genitalia, were under sterile covers, except only for a two square inch area of the scrotal skin that had been incised and sealed with glue. (T.351)

22. Complainant then complained of this incident to managerial staff of her employer, Respondent Mount St. Mary's Hospital. She left work early, because she was upset. (T. 284)

23. Complainant's husband called the police concerning this incident, who arrived at her home on the afternoon of August 13, 2004 and took a statement. (T. 284)

24. Complainant began a vacation the following day. (T. 285)

25. Respondent Mount St. Mary's Hospital interviewed Complainant at length concerning this incident when she returned to work from her vacation. (T. 398; 457)

26. The Respondent Hospital also interviewed witness Paul Livingston. (T. 465)

27. On the evening of August 13, 2004, Dr. Falsetti, the Chief of Medical Staff at the Respondent Hospital called Dr. Christoudoulides at home and informed him of the substance of the complaint that Complainant had lodged against him with Respondent Hospital. Dr. Falsetti further informed him that the police had been called in relation to this matter and that criminal charges had been filed against Dr. Christoudoulides. (T. 362)

28. Dr. Falsetti then informed Dr. Christoudoulides that the Respondent Hospital has a sexual harassment policy in effect, and that this kind of behavior simply is not tolerated and that his call should serve as a warning. (T. 362)

29. Dr. Falsetti then went on to tell Dr. Christoudoulides that if this was ever repeated, sanctions will follow. (T. 362)

30. Dr. Christoudoulides replied that he regretted making that joke and that he was sorry that Complainant took offense since it was all said in jest. (T. 362) Hence, Respondent Christoudoulides has essentially admitted the substance of the allegation against him.

31. In compliance with the requests of both Complainant and Respondent Christoudoulides, Respondent Hospital has not scheduled them to work together since August 13, 2004. (T. 119)

32. Complainant admits that offensive comments stopped as of August 13, 2004 (T. 294)

33. Complainant further asserts that in July of 2005 Respondent Christoudoulides failed to speak to her when she greeted him in front of an elevator. (T. 299) Respondent Christoudoulides believed that it was safer to have nothing to do with her, because of the pending criminal charges against him. (T. 365)

34. In 2006, after the Respondent Hospital knew of Complainant's complaint against Respondent Christoudoulides, the hospital awarded Complainant a contract to teach a class, which was funded by a grant from the State University of New York at Buffalo, but it later cancelled that contract because of insufficient student participation that failed to satisfy the requirements of the grant. The grant money was refunded to the University. (T. 423) Complainant admits that Respondent Christoudoulides was not involved in the termination of her contract. (T. 237)

35. Complainant alleges a retaliatory loss of overtime pay; however, overtime is dictated by the union contract and is rotated by seniority. (T. 416)

OPINION AND DECISION

The New York Court of Appeals has held that: "The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*) (*see, e.g., Matter of Laverack & Haines v New York State Div. of Human Rights*, 88 NY2d 734, 738; *Matter of Miller Brewing Co. v State Div. of Human Rights*, 66 NY2d 937, 938). On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination (*Texas Dept. of Community Affairs v Burdine*, 450 US 248, 252-253; *McDonnell Douglas Corp. v Green*, 411 US 792, 802) " *Ferrante v. American Lung Ass'n,* 90 N.Y.2d 623 ; 665 NYS2d 25 (1997)

The Supreme Court of the United States explained the necessary elements of proof of a prima facie case for sexual harassment, as follows:

> Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. Boca Raton*, 524 U.S. 775, 786, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986) (some internal quotation marks omitted)). *See also Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) (Only harassing conduct that is "severe or pervasive" can produce a "constructive alteration in the terms or conditions of employment"); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment"). Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher v. Boca Raton*, 524 U.S. at 787-788 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)). Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. Boca Raton, supra*, at 788

I find that the offensive remarks uttered by Dr. Christoudoulides were an isolated incident and were not pervasive. Frequency of the discriminatory conduct was limited to a few seconds out of one day in many years of service. The offensive conduct was not threatening nor intimidating. The Complainant admitted that she understood that the offensive remarks were a joke when they were uttered. After August 13, 2004, Complainant never worked with Respondent Christoudoulides again and she admits that the offensive language stopped. Hence, his remarks have not interfered with her work for over three years, nor have they interfered with the terms nor conditions of her job.

I find that the Respondent Hospital did a superb job of rapidly investigating the matter whereof the Complainant complained, by interviewing her as soon as she was available on the first day after her return from vacation, also interviewing witness Paul Livingston and calling Respondent Christoudoulides at his home on the very day of the conduct complained of . He was severely warned that such behavior is intolerable and that any repetition will result in sanctions. In essence, he admitted the substance of Complainant's allegations against him, such that there was approximate agreement as to the facts of the situation. The employer's remedy was instantly and completely successful in permanently stopping the objectionable behavior. Complainant's workplace was not permeated with discriminatory intimidation that was severe nor pervasive nor did it alter the conditions of her work environment, as proof of a "hostile work environment" theory requires. *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997)

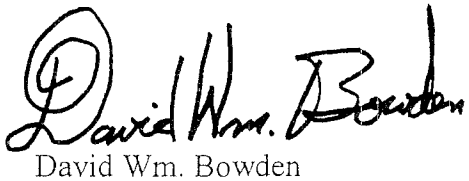
Complainant's other allegations have been considered, but have been found to lack merit.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the instant complaint is dismissed on the merits.

DATED: February 29, 2008
Bronx, New York



David Wm. Bowden
Administrative Law Judge